APPEAL NO. 030474
FILED APRIL 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 28, 2003. The hearing officer determined that respondent (claimant herein) sustained a compensable injury and that she had disability from June 4 through June 13, 2002; June 17 through June 19, 2002; June 24 through June 27, 2002; July 2, 2002; July 9, 2002; July 12, 2002, and July 17, 2002. Appellant self-insured (carrier herein) appeals these determinations on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends that the hearing officer erred in failing to admit Carrier's Exhibits Nos. 9, 10, and 11. Carrier exchanged the medical records in these three exhibits in a supplemental exchange on January 16, 2002, about two months after the November 26, 2002, benefit review conference. Carrier asserts that it exchanged these documents as they became available. However, carrier had information about claimant's prior motor vehicle accident (MVA), which was mentioned in the treatment notes from the date of claimant's injury. Therefore, the hearing officer could find that carrier could have obtained the medical records regarding this MVA much earlier, but did not use due diligence and do so. We conclude that the hearing officer did not err in concluding that the exhibits were not timely exchanged and that there was no good cause for the failure to timely exchange them.

Carrier asserts that the hearing officer should have admitted the documents because they established that "claimant was blatantly lying about information contained in those exhibits." Even if this were borne out by the record, which we conclude it is not, carrier did not object to the exclusion of the evidence on these grounds. Therefore, it waived any error in this regard.

We note that carrier attached a "green card" to its brief, apparently to show that it conducted the supplemental exchange in January 2003. That carrier did a supplemental exchange did not appear to be in dispute. This exhibit was offered for the first time on appeal and does not meet the requirements for its consideration on appeal. Having reviewed the document, we conclude that its admission on remand would not have resulted in a different decision and we decline to consider it. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

Carrier contends that the hearing officer erred in determining that claimant sustained a compensable injury. Carrier asserts that: (1) claimant had prior back

problems and that nothing from work, such as a strain or a fall, contributed to this idiopathic eruption; (2) claimant's injury was inevitable under the positional risk test; and (3) claimant was merely leaning and so did not sustain a compensable injury.

Section 401.011(12) defines "course and scope of employment" to mean "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." We have previously rejected the argument that an injury arising from an activity that could also be experienced outside of work is, per se, not compensable based on that fact alone. As we stated in Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995:

> In many, if not most, instances an accident could either occur at work or away from work, and, as a result, the fact that an accident could have occurred at some other location does not mean that an on-the-job injury becomes noncompensable under the positional risk test. In addition, the use of the word "would" by the Bratcher [Employers' Casualty Company v. Bratcher, 823 S.W. 2d 719 (Tex. App.-El Paso 1992, writ denied)] court in describing the "but for" test is indicative of the inevitability of the injury as opposed to the possibility that it could occur elsewhere. The purpose of the positional risk test is to ensure that there is some connection between the work and the risk of injury. That connection is present in this instance because claimant was at his regular duty station performing his work duties at the time of his injury. That is, the "employment brought the employee in contact with the risk that in fact caused his injuries." Bratcher, 823 S.W. 2d at 722 (citing Walters. v. American States Ins. Co., 654 S.W. 2d 423 (Tex. 1983)).

In this case, there is a connection between the claimant's work and her injury. There was evidence that claimant was injured when she leaned in her chair toward the computer screen and felt a pop. The hearing officer could find that claimant sustained an injury in the course and scope of her employment. We perceive no error.

To the extent that carrier asserts that claimant's injury occurred while "merely sitting," we note that the line of cases discussing whether injuries sustained during "mere sitting" and "mere walking" are occupational disease cases. This case involves a specific injury. Therefore, those cases are distinguishable. *See* Texas Workers' Compensation Commission Appeal No. 001002, decided June 22, 2000; Texas Workers' Compensation Commission Appeal No. 991312, decided August 5, 1999.

Carrier contends that claimant did not have disability because she did not sustain a compensable injury. We have rejected carrier's arguments in this regard and, therefore, we conclude that the hearing officer did not err in making the disability determination. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed

the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is:

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
THE STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Terri Kay Oliver
Appeals Judge